A **SOONLY METAL WORKS v. NCN MARKETING SDN BHD**

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
HAMID SULTAN ABU BACKER JCA
MARY LIM JCA
B [CIVIL APPEAL NO: J-02(NCVC)(W)-1620-09-2016]
27 FEBRUARY 2018

CIVIL PROCEDURE: *Trial – Procedure – Consolidation of suits – Refusal of – Whether determination of plaintiff's claim dependent on determination of another*
C *suit – Whether other suit ought to be resolved together with plaintiff's claim – Whether ought to be jointly tried – Whether court could conduct trials or adjudicate related claims arising from same events and issues on instalment basis – Whether court could direct parties to confine themselves to only certain issues – Whether parties would be caught in a vicious cycle of injustice – Whether fit case for order*
D *that there was mistrial – Whether there was miscarriage of justice – Courts of Judicature Act 1964, s. 71*

The appellant's ('the plaintiff') case in this suit was in relation to a construction claim wherein the respondent ('the defendant') was said to have agreed to transfer its land in settlement of monies of outstanding work done
E by the plaintiff for the defendant. The plaintiff had built two temporary stores for the defendant subject to certain terms and conditions under a 'building agreement'. According to the plaintiff, the parties had met on four separate occasions to resolve the matter of the outstanding claims under the building agreement. The plaintiff claimed that the meetings resulted in an admission
F by the defendant of the monies owed, and that the defendant agreed to settle the sum owed by way of a transfer of a second plot of its land. The defendant was said to have also agreed to pay the balance outstanding sums in cash instalments after the charged land had been auctioned off. A draft settlement agreement and a draft sales and purchase agreement ('SPA') were drawn up.
G The plaintiff went to the High Court to claim for, *inter alia*, an order of specific performance of the agreements. The defendant, however, disputed the terms of the building agreement, contending, *inter alia*, that the plaintiff was supposed to build four temporary stores but had instead built only two. The defendant also claimed that the plaintiff had unilaterally increased the
H price of the stores without the defendant's knowledge and consent. The defendant further denied that the terms were settled in the settlement agreement and the draft SPA, contending in essence that the settlement was very much dependent on the resolution of the building agreement and complaints relating to work done by the plaintiff. Four months after this suit was filed, relying on the same factual background, the defendant sued the
I plaintiff for breach of the building agreement in the High Court ('suit 26'). An application to consolidate the two cases was refused in suit 26 and an oral application for the same was also refused by the trial judge. The judge

ordered for the present case to be tried first and further, that the trial be confined to the settlement agreement without touching on the building agreement, its related problems and the issues of costs of construction as these matters had yet to be determined in suit 26. In dismissing the plaintiff's claim, the judge found that the existence of the settlement agreement was not proved because the terms and conditions had not been agreed. Hence, the plaintiff appealed.

Held (allowing appeal)
Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) The determination of the plaintiff's claim was dependent on the determination of the construction claim or breach of the building agreement that was filed by the defendant, that was, suit 26. Suit 26 must be resolved either first or together with the present claim. It must be jointly tried for it was only after the issue that there were any monies outstanding under the building agreement had been determined that the plaintiff's claim for monies outstanding could be answered. After all, suit 26 as well as the reasons relied on in the defence to the present claim pertained to the same matters and issues arising from the building agreement : the number of temporary stores to be built, the agreed price of the construction works, to name a few. Hence, this was a fit case for an order that there had been a mistrial. (para 10)

(2) The court must never conduct trials or adjudicate related claims that arise from the same events and concern the same or common issues, especially where they involve the same parties represented by the same solicitors, on instalment basis or with abject refusal to see the impracticalities of their trial directions such that would result in an injustice. It was asking for the impossible to direct the parties to confine themselves to only the matter of the settlement agreement and the sale and purchase agreement when the matter of the building agreement was yet unresolved. Refusing the plaintiff the right to call its witnesses including subpoenaed witnesses only added further injustice. (para 11)

(3) It was a fit and proper case to exercise this court's statutory power. This was a classic case of a miscarriage of justice and in consequence, this court was statutorily bound under s. 71 of the Courts of Judicature Act 1964 to set aside the order of the High Court. The matter was thus directed to be heard together with suit 26. (paras 1 & 14)

Bahasa Malaysia *Headnotes*

Kes plaintif dalam guaman ini berhubung dengan tuntutan pembinaan di mana defendan dikatakan telah bersetuju menyerahkan tanahnya bagi penyelesaian wang yang masih terhutang untuk kerja-kerja yang dilaksanakan oleh plaintif untuk defendan. Plaintif telah membina dua buah stor sementara untuk defendan, tertakluk pada beberapa terma dan syarat bawah satu 'perjanjian pembinaan'. Menurut plaintif, pihak-pihak yang terlibat telah

berjumpa sebanyak empat kali untuk menyelesaikan perkara berkenaan tuntutan-tuntutan tertunggak bawah perjanjian pembinaan. Plaintif menghujahkan mesyuarat-mesyuarat tersebut membawa kepada pengakuan defendan berkenaan wang yang masih dihutanginya dan bahawa defendan bersetuju untuk menyelesaikan jumlah yang dihutanginya melalui pemindahan sebidang tanah kedua. Defendan juga dikatakan telah bersetuju untuk membayar baki jumlah tertunggak secara ansuran selepas tanah yang digadaikan berjaya dilelong. Satu draf perjanjian penyelesaian dan satu draf perjanjian jual beli ('PJB') telah digubal. Plaintif ke Mahkamah Tinggi untuk tuntut, antara lain, satu perintah pelaksanaan spesifik perjanjian-perjanjian. Defendan, walau bagaimanapun, mempertikaikan terma-terma perjanjian pembinaan, dengan berhujah, antara lain, bahawa plaintif sepatutnya membina empat stor sambilan tetapi hanya membina dua buah. Defendan juga mendakwa plaintif telah secara unilateral menaikkan harga stor-stor tanpa pengetahuan atau kebenaran defendan. Defendan juga menafikan bahawa terma-terma telah diselesaikan dalam perjanjian penyelesaian dan draf PJB, dengan berhujah, pada dasarnya, bahawa penyelesaian bergantung kepada resolusi perjanjian pembinaan dan aduan-aduan berhubungan kerja-kerja yang dilakukan oleh plaintif. Empat bulan selepas guaman ini difailkan, dengan bergantung pada latar belakang fakta yang sama, defendan menyaman plaintif untuk pelanggaran perjanjian pembinaan di Mahkamah Tinggi ('guaman 26'). Satu permohonan untuk menggabungkan kedua-dua kes ditolak dalam guaman 26 dan satu permohonan secara lisan untuk yang sama juga telah ditolak oleh hakim bicara. Hakim memerintahkan kes ini dibicarakan dahulu dan juga bahawa perbicaraan dihadkan pada perjanjian penyelesaian tanpa menyentuh perjanjian pembinaan, masalah-masalah berhubungan dengannya serta isu-isu kos pembinaan kerana perkara-perkara ini belum lagi ditentukan dalam guaman 26. Dalam menolak tuntutan plaintif, hakim mendapati kewujudan perjanjian penyelesaian tidak dibuktikan kerana terma-terma dan syarat-syarat tidak disetujui. Oleh itu, perayu merayu.

Diputuskan (membenarkan rayuan)

Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Penentuan tuntutan plaintif bergantung pada penentuan tuntutan pembinaan atau pelanggaran perjanjian pembinaan yang difailkan oleh defendan, iaitu guaman 26. Guaman 26 harus diselesaikan terlebih dahulu atau bersama dengan tuntutan ini. Guaman 26 mesti dibicara bersama kerana hanya selepas isu bahawa sama ada terdapat wang yang masih tertunggak bawah perjanjian pembinaan ditentukan, barulah tuntutan plaintif untuk wang yang masih tertunggak boleh dijawab. Lagipun, guaman 26 dan alasan-alasan yang pembelaan bergantung pada dalam guaman ini berhubung perkara-perkara dan isu-isu yang sama berbangkit daripada perjanjian pembinaan: salah satunya adalah jumlah stor sambilan yang harus dibina dan harga yang disetujui berkenaan kerja-kerja pembinaan.

(2) Mahkamah tidak boleh mengendalikan perbicaraan atau memutuskan perbicaraan tuntutan-tuntutan yang berbangkit daripada kejadian-kejadian yang sama dan melibatkan isu-isu sama, terutama sekali apabila ia melibatkan pihak-pihak yang sama yang diwakili peguam-peguam yang sama, secara beransuran atau dengan keengganan melarat untuk melihat betapa tidak praktikalnya arahan perbicaraan mereka sehingga satu ketidakadilan berlaku. Agak mustahil untuk mengarahkan pihak-pihak membataskan diri mereka hanya pada perkara perjanjian penyelesaian dan perjanjian jual beli apabila perkara perjanjian pembinaan belum diselesaikan. Menolak hak plaintif memanggil saksi-saksinya termasuk saksi-saksi yang disepina hanya menambahkan ketidakadilan lanjut.

(3) Ini adalah kes yang sesuai untuk melaksanakan kuasa statutori mahkamah. Ini adalah satu kes klasik salah laksana keadilan dan akibatnya mahkamah terikat secara statutori bawah s. 71 Akta Mahkamah Kehakiman 1964 untuk mengetepikan perintah Mahkamah Tinggi. Perkara ini dengan itu diarahkan didengar bersama-sama dengan guaman 26.

Legislation referred to:
Courts of Judicature Act 1964, ss. 69, 71

For the appellant - Manian K Marappan; M/s Manian K Marappan & Co
For the respondent - Diljit Kaur Puran Singh; M/s Diljit & Co

[Editor's note: Appeal from High Court, Muar; Civil Suit No: 22NCVC-7-02-2014 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant/plaintiff's appeal came up for hearing on 5 July 2017. From the basic facts of the case as well as the conduct of the defendant denying the plaintiff's claim in this suit and also filing a separate claim against the plaintiff on the same transaction to claim damages for breach of contract and the trial court in this case refusing to consolidate both matters and dismissing the plaintiff's claim, in our view was a classic case of mistrial and/or miscarriage of justice and in consequence we were statutorily duty bound under s. 71 of the Courts of Judicature Act 1964 (CJA 1964), to set aside the order of the High Court and order this suit and the defendant's suit to be heard together in the High Court. This is not also a fit and proper case to exercise our powers under s. 69 of the CJA 1964 to embark in a process called rehearing the matter in the Court of Appeal.

[2] As we have ordered a retrial with the defendant's suit, we do not wish to set out the facts and/or application of the law by the learned judge in any detail as we are obliged not to do so under s. 71 of the CJA 1964.

[3] The said s. 71 of the CJA 1964 read as follows:

> New trial
>
> 71. (1) Except as hereinafter provided the Court of Appeal shall have power to order that a new trial be had of any cause or matter tried by the High Court in the exercise of its original or appellate jurisdiction.
>
> (2) A new trial shall not be granted on the ground of improper admission or rejection of evidence unless in the opinion of the Court of Appeal some substantial wrong or miscarriage of justice has been thereby occasioned; and if it appears to the Court of Appeal that the wrong or miscarriage affects part only of the matters in controversy, or some or one only of the parties, the Court of Appeal may give final judgment as to part thereof, or as to some or one only of the parties, and direct a new trial as to the other part only, or as to the other party or parties.
>
> (3) A new trial may be ordered on any question without interfering with the finding or decision of the court below upon any other question.

It is also important to note that s. 69 must be read together with s. 71 and any judicial decisions which had not considered s. 71 complained when exercising powers under s. 69 must seen to be *per incuriam*. Section 69 of the CJA 1964 reads as follows:

> Hearing of appeals
>
> 69. (1) Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.
>
> (2) The further evidence may be given without leave on interlocutory applications, or in any case as to matter which have occurred after the date of the decision from which the appeal is brought.
>
> (3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.
>
> (4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.
>
> (5) The powers aforesaid may be exercised notwithstanding that the notice of appeal relates only to part of the decision, and the powers may also be exercised in favour of all or any of the respondents or parties although the respondents or parties have not appealed from or complained of the decision.

Brief Facts

[4] The plaintiff's case in this suit relates to a construction claim wherein the defendant is said to have agreed to transfer its land in settlement of monies outstanding for work done by the plaintiff for the defendant. The plaintiff had built two temporary stores for the defendant subject to certain terms and conditions under a "building agreement". According to the plaintiff's statement of claim, the parties met on four separate occasions to resolve the matter of the outstanding claims under the building agreement. At two of those meetings, the parties even had their respective lawyers in attendance. The plaintiff claimed that the meetings resulted in an admission by the defendant of the monies owed, that the defendant agreed to settle the sum owed by way of a transfer of a second plot of its land. That plot of land was, at the material time, still charged to OCBS Bank. The defendant is further said to have agreed to pay the balance outstanding sums in 12 cash instalments after the charged land had been auctioned off. A draft settlement agreement and a draft sales and purchase agreement (SPA) were then drawn up. The plaintiff was in court to claim for, *inter alia* an order of specific performance of the agreements. This suit was filed in February 2014.

[5] The existence of the building agreement, the construction and completion of two temporary stores, and the four meetings, two of which the defendant's lawyers were not present, are not in dispute. In the defence filed, what the defendant disputed were the terms of the building agreement contending *inter alia* that the plaintiff was supposed to build four temporary stores but had instead built only two. Even the two stores that were built were alleged to be not in accordance with the approved plans in which case the defendant insisted that the plaintiff had to demolish and rebuild the same. The defendant also claimed that the agreed price of the four stores was RM800,000 and that the plaintiff had unilaterally increased the price to RM1,059,846 without the defendant's knowledge and consent. As for the settlement agreement and the draft SPA, the defendant denied that the terms were settled, contending in essence, that the settlement was very much dependent on the resolution of the building agreement and complaints relating to work done by the plaintiff.

[6] Four months after this suit was filed, relying on the same factual background and using substantially the same matters raised in its defence to the present claim, the defendant sued the plaintiff for breach of the building agreement in the same High Court (No. 22NCVC-26-06 2014 (suit 26)).

[7] An application to consolidate the two cases was refused in suit 26. An oral application for the same was also refused by the trial judge. This is despite recognising at para. 4 of the judgment that the settlement agreement arises from the building agreement wherein the plaintiff had built two temporary stores for the defendant, and that suit 26 had yet to be heard. The parties then asked for the present case to be heard first. At para. 7 of the

judgment, the learned judge ordered for the present case to be tried first and further, that the trial be confined to the settlement agreement without touching on the building agreement, its related problems and the issues of costs of construction as these matters had yet to be determined in suit 26.

[8] At the trial, the defence of no settlement was maintained and the reasons for the defendant's stand was summarised as the "five reasons" ascribed to the plaintiff; namely:

(i) Reason 1 - unilateral increase in construction costs

(ii) Reason 2 - construction not completed, passion not delivered

(iii) Reason 3 - failure to obtain CCC

(iv) Reason 4 - building was built 37 feet too far from front

(v) Reason 5 - refusal to sign surat akuan for release of bank loan

[9] The plaintiff's claim was dismissed. The learned judge found that the existence of the settlement agreement was not proved because the terms and conditions had not been agreed. Amongst those terms that had yet to be agreed was the price of the construction of the buildings – "tambahan pula harga atau kos sebenar bangunan yang dibina belum lagi dipastikan dengan tepat memandangkan tindakan mengenai Perjanjian Bangunan belum lagi diputuskan oleh mahkamah ini." The learned judge asked herself how could the settlement agreement be signed when the actual amount outstanding had yet to be determined; that the subject of the actual costs of construction was an important subject which was yet to be determined in suit 26 - see para. 12 ix.

[10] We agreed with the submissions of learned counsel for the plaintiff that this is a fit case for an order that there has been a mistrial. We were of the view that the determination of the plaintiff's claim was dependent on the determination of the construction claim or breach of the building agreement that is filed by the defendant, that is, suit 26. Suit 26 must be resolved either first or together with the present claim. It must be jointly tried for it is only after the issue of whether there are any monies outstanding under the building agreement has been determined that the plaintiff's claim for monies outstanding can be properly answered. After all, suit 26 as well as the "five reasons" relied on in the defence to the present claim pertain to the same matters and issues arising from the building agreement: the number of temporary stores to be built, the agreed price of the construction works, to name a few.

[11] The court must never conduct trials or adjudicate related claims that arise from the same events and concern the same or common issues, especially where they involve the same parties represented by the same solicitors, on instalment basis or with abject refusal to see the impracticalities of their trial directions such that injustice result as has happened here. It was

asking for the impossible to direct the parties to confine themselves to only the matter of the settlement agreement and the sale and purchase agreement when the matter of the building agreement was yet to be unresolved. Refusing the plaintiff the right to call its witnesses including subpoenaed witnesses only added further injustice.

[12] To save judicial time to demonstrate mistrial and/or miscarriage of justice, we set out in *verbatim* a part of the submissions of learned counsel for the plaintiff which reads as follows:

> Refusal Of Consolidation And Joint Trial
>
> Applications
>
> 11. An application for consolidation of this case with the other case was made by the Plaintiff in the other case but the High Court refused to grant the order for consolidation.
>
> 12. Thereafter, an oral application was made in this case for this case to be heard jointly with the other case but this too was refused.
>
> (a) Please see Paragraph 5 of Grounds of Judgment ("Grounds"), page 7, Rekod Rayuan Tambahan where it is recorded that an application for "kedua-dua tindakan didengar bersama. Tetapi permohonan Plaintif tersebut telah ditolak oleh YA Hakim terdahulu berdasarkan bantahah oleh pihak Defendan"
>
> (b) However, the application made before the previous learned Judge in the other case was to consolidate the two matters, not for them "didengar bersama" (see Pages 290 to 300, Jilid 2, Rekod Rayuan).
>
> (c) The application made in this case was for the joint trial but this was refused with the learned Judge commenting that she could not make an order which is inconsistent with her predecessor.
>
> (d) The learned Judge was clearly wrong when she equated "consolidation" with "joint trial".
>
> [13] The learned judge in the other case was wrong to refuse the application for consolidation and the learned judge in this case was wrong to refuse the application for a joint trial.
>
> (a) This is because the other case is predicated on the same allegations which are used to found the 5 Reasons and the Defence in this case was predicated on the 5 Reasons and as such this case **is inseparable** from the other case, in fact, the other case should be brought as a Counterclaim in this case (emphasis added).
>
> (b) There was no appeal lodged against the refusal of the applications because it was thought (perhaps mistakenly) that they were unappealable interlocutory orders.

The Grave Injustice To The Plaintiff

14. The learned Judge should have held that the Defendant's other case should have been filed as a Counterclaim in this case since they arose out of the same transaction and involved the same parties and witnesses and that since it was not filed as a Counterclaim, the other case should be consolidated or at least heard together with this case.

15. Instead, the learned Judge in this case erred in a fundamental way by insisting that she stayed consistent with her predecessor and that the case be heard separately (although her predecessor ruled against consolidation, not joint trial).

16. Further, the learned Judge proceeded to deny the Plaintiff the right to call 9 other witnesses on the ground that their evidence is not relevant here but only in the other case and allowed the Plaintiff to call 2 witnesses.

(a) The other 9 Plaintiffs witnesses were vital to rebut the 5 Reasons which formed the backbone of the Defence.

17. To make matters worse, the Judge directed the Witness Statement of SP-1 to be expunged of all matters which should be raised only in the other case although they were relevant to rebut the 5 Reasons in the Defence.

18. As a result of the Judge's interference into and denial of the Plaintiffs right to call its own witnesses and conduct its own case which are essential features of an adversarial system, a grave injustice has been caused to the Plaintiff and their case.

(a) This Court of Appeal in *Syed Ibrahim Syed Mohd v. Esso Production Malysia Incorporated* [2004] 2 MLJ 49 at 74 said:

> .... it is left to the parties in a given case to present their respective cases in the manner as appears to them and not for the courts to direct or dictate to them as to how to conduct their case. A court would not descend into the arena of the parties except possibly in one of those situations where not, to do so would defeat the rights of a party altogether and to cause a gross injustice to him.

(b) The Judge should only adjudicate on the pleadings and evidence produced by the parties and act as an impartial referee ... *Jones v. National Coal Board* [1957] 2 QB 55 at 64 per Lord Denning.

(c) In *Payremalu a/l Veerappan v. Dr. Amarjeet Kaur & Ors* [2001] 3 MLJ 125, it was said that a judge should just be a passive umpire of the facts.

(d) And this Court recently sitting in Kuching held in Ting Sieh Chung @ *Ting Sie Chung v. Hock Peng Realty* [2016] 5 MLJ 342 held that:

> [13] ... From the perspective of an adversarial system in civil litigation, both parties bear the corresponding burden to prove its respective case, and as such, both parties are at liberty to adduce evidence to establish its own case.

Absurdity Arising Out Of Separating The Case Into "This Case" And "The Other Case" - Paragraphs 2 and 3, Memorandam Rayuan Tambahan

19. The Learned Judge had insisted that the issue in this case was whether there was an oral settlement agreement reached and that the issue in that other case was about the construction contract and she was adamant to separate the facts and evidence into two clear compartments although there was the connecting 5 Reasons staring from the Defence.

(a) At Paragraph 7 of the Grounds (Page 8, Rekod Rayuan Tambahan), the learned Judge made it clear that in this case, she did not want to touch on matters relating to the construction and said, "Memandangkan tuntutan mengenai Perjanjian Bangunan mengenai Bangunan Stor Sementara belum lagi dibicarakan oleh Mahkamah ini, Mahkamah ini telah mengarahkan supaya perbicaraan ini dijalankan terhad untuk Perjanjian Penyelesaian tanpa menyentuh pembinaan bangunan, masalah dan kos pembinaan bangunan kerana isu tersebut belum diputuskan."

(b) Yet, it was the circumstances of the construction and the Defendant's allegations concerning the Perjanjian Pembinaan which form the basis for the 5 Reasons used by the Defendant here to defend the Plaintiff's claim based on compromise or settlement agreement.

(c) Now with the Defendant's Defence based on the 5 Reasons, in order to arrive at a conclusion of the issue "Was there a settlement agreement reached?", it was incumbent and absolutely necessary for the Court to examine the truth of those 5 Reasons and as such, it was wrong for the Court to hold adamantly that it would not delve into issues relating to the construction.

(d) The learned Judge ought to take into account of all the facts surrounding the construction and the disputes and problems between the parties so as to make an assessment on whether the 5 Reasons were true or just mere afterthoughts or had been rectified.

20. As such, the oral settlement agreement and the construction agreement were closely connected by reason of the 5 Reasons stated in the Defence in this case and yet the learned Judge was adamant throughout the trial to keep them distinctly apart.

(a) Yet, the learned Judge seemed to recognise their connection when she commented at Paragraph 4 of the Grounds (Page 7, Rekod Rayuan Tambahan), that "Perjanjian Penyelesaian tersebut timbul dari Perjanjian Bangunan Stor Sementara antara kedua pihak di mana Plaintif telah membuat bangunan untuk Defendan. Perjanjian Bangunan Stor Sementara tersebut masih belum dibicarakan.

21. The Judge's insistence to divide the case into two instalments of litigation had done much damage and injustice to the Plaintiff.

(a) At Paragraph 12 of the Grounds (Page 18, Rekod Rayuan Tambahan), the learned Judge held that the oral settlement

agreement as alleged by the Plaintiff did not exist because "ianya tidak disimpulkan atau dimuktamadkan akan terma-termanya."

(b) As to why she held as such, the learned Judge stated her reasons in the following sub-paragraphs (i) to (x).

(c) In sub-paragraph (i), the learned Judge held that she could not determine the completion of the construction and the total construction costs as RM1,059,846.00 as claimed by the Plaintiff because "isu pertambahan kos ini dan isu kesempurnaan pembinaan bangunan kerana terdapat satu lagi tindakan lain yang melibatkan kedua-dua pihak untuk isu perjanjian tersebut ... Oleh itu, semua hujahan Plaintif mengenai bangunan tidak dapat dipertimbangkan di peringkat ini."

(d) The learned Judge should consider this issue because Reason 1 of the 5 Reasons states that the Plaintiff unilaterally increased the construction price from RM800,000.00 to RM1,059,846.00 and the learned Judge must decide whether Reason 1 was true or a pure unadulterated lie.

(e) If the learned Judge were to take into consideration the relevant evidence and not discard them as belonging to the other case and could be considered here, the learned Judge would have found that:

(i) The construction had been completed; and

(ii) The total construction cost was RM1,059,846.00 and this was known to and accepted by the Defendant; and

(iii) The Defendant had paid RM90,000.00 in 6 equal monthly instalments of RM15,000 each After construction had been completed and After knowing and agreeing that the total construction had gone up from RM800,000.00 to RM1,059,846.00 due to variation and additional works.

(iv) The Defendant had agreed to contra his land (as per Plaintiff's case here) to settle the balance of RM989,846.00.

22. It was most unfair and wrong for the learned Judge to hold in effect as follows:

(a) There were issues necessary to determine whether there was a settlement agreement which had not been decided in that other case; and

(b) The issues in that other case could not be decided here as this Court had decided against any consolidation or a joint trial with that other case; and

(c) Because those issues had not been decided, the terms and conditions of the alleged settlement agreement were not firmed; and

(d) Because of that, there was no settlement agreement reached.

23. As said, the Judge was essentially saying that, "I find that there was no settlement agreement because certain issues have not been decided and I cannot decide those issue because they are in the other case." The Plaintiff was put and caught in a vicious cycle of injustice.

[13] Learned counsel for the respondent was candid on the issue of mistrial and/or miscarriage of justice and did not resist the facts in relation to mistrial and/or miscarriage of justice in any material sense before us.

[14] After hearing the parties on mistrial and/or miscarriage of justice, we took the view that it was a fit and proper case to exercise our statutory power. In consequence, we set aside the order of the High Court and directed the matter to be heard together with suit 26.

[15] For reasons stated above, the appeal was allowed with no order as to costs. The order of the High Court was set aside. This suit was to be heard together with Suit No. 22 NCVC-07-06-2014. Deposit was to be refunded.

We hereby ordered so.